No. 89-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION

Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, AND WILLIAM W. SHAFFER,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT BY RESPONDENTS THE LTV CORPORATION, LTV STEEL COMPANY, INC., THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES, AND THE LTV BANK GROUP

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QUESTION PRESENTED

The question presented by the Pension Benefit Guaranty Corporation (PBGC) is argumentative and has no basis in the actual holdings made by a unanimous panel of the Court of Appeals for the Second Circuit (Van Graafeiland, Meskill and Miner) affirming in full the decision of the District Court for the Southern District of New York (Sweet, J.), which vacated the PBGC's Notice of Restoration and remanded the matter to the agency. An accurate description of the question presented by the decision below is as follows:

1. May a reviewing Court vacate and remand the PBGC's Notice of Restoration, based, in the agency's words, "on LTV's establishment of abusive follow-on plans," and "its financial improvements," PBGC's Petition for Certiorari at 11, where nothing in ERISA prohibits the establishment of "follow-on" plans, and the administrative record:

   a. provided no support for the agency's conclusion that the plans established by LTV were abusive "follow-on plans";

   b. established that the agency failed to consider the federal bankruptcy law and labor law policies affected by restoration;

   c. established that the agency's "financial improvement" rationale had several fundamental gaps in reasoning;

   d. established that the agency did not consider LTV's status as a debtor in bankruptcy in assessing LTV's "financial improvement";

e. established that the agency did not assess the possibility that the restored plans would have to be re-terminated; and

f. established that the agency did not apprise LTV of the material on which it would base its decision, give LTV an adequate opportunity to offer contrary evidence, proceed in accordance with ascertainable standards nor provide a statement showing its reasoning?

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STATUTES INVOLVED

This case involves sections 4002, 4041, 4042 and 4047 of the Employee Retirement Income Security Act of 1974 (''ERISA''), 29 U.S.C. §§ 1302, 1341, 1342 and 1347, see

Pet. App. 133a-157a; the Bankruptcy Code, 11 U.S.C. §§ 1113, 1114; and the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), see Appendix A to this Brief.

PRELIMINARY STATEMENT

The petition should be denied. As the agency concedes, since the PBGC involuntarily terminated the LTV plans, Congress has enacted substantial amendments to ERISA going to the very policy issues the agency claims are implicated by the decision in this case. In doing so, Congress specifically rejected proposed prohibitions of follow-on plans. These substantial amendments seriously undercut the agency's policy arguments in support of its petition. Furthermore, these amendments — which are not applicable to this case — make this case a poor vehicle for this Court to delve into the statutory complexity of ERISA.

Moreover, the decision below is correct and raises no issues calling for review by the Court. In opinions carefully tied to the complex facts of this case, both the District Court and a unanimous panel of the Court of Appeals found on numerous independent bases that the action of the PBGC was arbitrary and capricious. Neither court had to deviate from, or even significantly elaborate upon, well-established principles of administrative law in reaching this result, because the agency's action failed to meet even the most minimal standards of reasoned decision making. Neither court "substituted" its judgment for that of the agency, because as to numerous factors clearly relevant to the restoration decision both courts found that the agency had performed *no* analysis and established *no* ascertainable standards. Under basic principles of administrative law, a remand to the agency was required.

STATEMENT OF THE CASE

LTV's Bankruptcy and PBGC's Involuntary Pension Plan Terminations

On July 17, 1986, LTV, LTV Steel and its affiliates filed Chapter 11 petitions. LTV Steel was in 1986 the second largest steel company in the United States, created by the merger of Jones & Laughlin Steel Company, Youngstown Sheet & Tube Company and Republic Steel Corporation. Pet. App. 37a. However, the pressures of surviving in an industry battered by foreign competition proved too much, and by 1986 LTV was suffering from record losses in the steel business, a weak dollar, declining steel shipments and the tightening of LTV's credit. It was faced with impending defaults under its credit agreements, and its bank lines had been terminated. AR 237-238, 706-706.

After the filings, LTV continued to operate its businesses for the benefit of its creditors and security holders. LTV's objective as a debtor in Chapter 11 is to reorganize and streamline its businesses so as to maximize their value in order that its thousands of creditors, including the PBGC, may receive a fair and equitable recovery in a plan of reorganization. A normal and foreseeable objective in Chapter 11 is to accumulate cash, since a debtor may not pay its prepetition debts except pursuant to a plan of reorganization or court order. Since the filing LTV has accumulated millions of dollars which must be used to settle the billions of dollars of claims of all of its creditors.

At the time it filed its Chapter 11 petition LTV bore massive pension and other obligations. Each steel company had brought its pension obligations to the merged entity. To reduce costs and improve efficiency, LTV Steel had shut

down extraneous facilities, triggering its obligations to those laid off. Pet. App. 37a. As a result, LTV Steel's growing pension and retiree health liabilities rested on an ever shrinking base. By 1986 LTV Steel's 24,544 active workers supported 77,182 retirees, three retirees for each worker. *Id.* Calculated under ERISA, the total present value of LTV Steel's unfunded past service liabilities for pension costs attributable to pre-Chapter 11 benefits was estimated in 1986 to exceed two billion dollars. *Id.*

Shortly after the filing, LTV Steel approached the USWA to seek renegotiation of the 1986 collective bargaining agreement. AR 238. Because the hourly pension plans were established pursuant to a USWA collective bargaining agreement, ERISA prevented LTV Steel from terminating its hourly pension plans without first bargaining with the USWA. 29 U.S.C. § 1341(a)(3) (Supp. IV 1986). The USWA was adamantly opposed to renegotiation and would not support termination of the pension plans. *Id.* At the same time, LTV was prohibited as a matter of bankruptcy law from making contributions to the pension plans relating to pre-petition service. Each month, thirty-one million dollars was being paid out of the plans. Each day uneconomic facilities closed and liabilities increased. AR 2.

In September, 1986 one of the salaried plans, the Republic Retirement Plan, ran out of assets. The PBGC moved under the involuntary termination provisions of ERISA to terminate the plan. AR 1. On January 12, 1987, to "avoid an unreasonable deterioration of the Plans' financial condition or an unreasonable increase in the liability of the PBGC's insurance funds," the PBGC involuntarily terminated three other plans. Pet. App. 42a. At that time, the PBGC projected that as a result of LTV's Chapter 11 status LTV would accumulate "just over $1 billion by the end of 1988," but understood that

such cash could not be sufficient to both "finance a plan of reorganization and the ongoing [pension] Plans." AR 4. LTV consented to the terminations. Pet. App. 42a. The PBGC then filed claims exceeding two billion dollars against each of the debtors, and continued its already intense involvement in the reorganization process. If the plans remain terminated, those claims, along with those of all other creditors, will be paid pursuant to a plan of reorganization. The PBGC is aware that LTV and its unsecured steel creditors have offered to pay the PBGC a substantial sum pursuant to such a plan.[1]

The 1987 Interim Labor Agreement

The PBGC's involuntary terminations caused severe loss of pension and other employee benefits to approximately fifteen percent of LTV Steel's retirees. Active workers not only lost benefits under the terminated plans, they also had no vehicle for the accrual of pension benefits for service performed following termination. Pet. App. 42a; AR 479-480. The USWA opposed the terminations, appealed the termination orders, Pet. App. 43a n.9,[2] and initiated a lawsuit in the Bankruptcy Court alleging that LTV Steel had violated the labor contract and Section 1113 of the Bankruptcy Code. Pet.

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1. The dispute over the PBGC's claims to which the agency alludes, PBGC Pet. Cert. 8 n.8, is over the status and amount of the claims. Whatever the outcome, the PBGC's recovery will be substantial, not "a few cents on the dollar," PBGC Pet. Cert. 16 n. 14.

2. The PBGC defended the terminations before the Court of Appeals for the Second Circuit, which on July 17, 1987 affirmed the involuntary termination orders. *Jones & Laughlin Hourly Pension Plan* v. *The LTV Corp.*, 824 F.2d 197 (2d Cir. 1987) and *Jones & Laughlin Retirement Plan* v. *The LTV Corp.*, 824 F.2d 202 (2d Cir. 1987).

App. 8a; AR 694.

The plan terminations provided the impetus for renewed bargaining between the USWA and LTV Steel. LTV Steel was concerned that the USWA might strike, at a cost to LTV of $100 million per month.[3] Pet. App. 8a; AR 1574. After weeks of intense and complicated negotiations, an interim agreement was reached in which the USWA made significant concessions in many areas which ultimately would generate annual savings to LTV Steel of approximately $50 million. Pet. App. 45a. In return, LTV Steel agreed to an array of new programs designed to replace some of the benefits lost as a result of the involuntary terminations of the pension plans.[4]

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3. LTV's concern that the USWA might strike was well-founded. The USWA had struck the Wheeling-Pittsburgh Steel Company, another Chapter 11 debtor, in part for its failure to pay post-termination pension benefits, and had just concluded a six-month strike at USX Corporation, the nation's largest steel company. Pet. App. 43a. Indeed, at the very beginning of the LTV cases the USWA had struck LTV Steel's most important facility in response to LTV Steel's initial inability to pay retiree medical benefits. *In re Chateaugay Corp.*, 87 B.R. at 779, 789 (S.D.N.Y. 1988). LTV Steel had quickly obtained court authority to pay these benefits. *In re Chateaugay Corp.*, 64 B.R. 990 (S.D.N.Y. 1986) (MJL), and Congress had unanimously passed a statute requiring full payment of retiree health benefits. See Pub. L. No. 99-591, 100 Stat. 3341, amended by Pub. L. No. 100-41, 101 Stat. 309 and by Pub. L. No. 100-99, 101 Stat. 716; see also Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (codified in part at 11 U.S.C. § 1114).

4. The programs implemented in the interim agreement include not only replacement pension benefits for both active employees and retirees, but also programs for the payment of benefits to workers who are disabled, to spouses of employees who die while in active service, and to workers who lose their jobs as a result of plant shutdowns and who do not yet qualify for Social Security benefits. Pet. App. 45a; AR 242-246. The new programs, which do not provide a full recovery of the level of benefits lost, also differ substantively from those provided under the terminated plans, most notably in that none of these programs is guaranteed by the PBGC. The plans established by the 1987 collective bargaining agreement will be referred to hereinafter as the "CBA Plans."

Id. The agreement is expressly designed as an interim arrangement. *Id.* A new labor agreement must be negotiated to govern the parties' post-confirmation relationship, and that agreement will be the subject of bargaining as a plan of reorganization is completed with all of LTV Steel's creditors. AR 241.

When the PBGC learned of the agreement, the agency took the position that unspecified aspects of the proposed agreement violated a PBGC "policy" against post-termination benefits and therefore was abusive. LTV Steel, the PBGC and the USWA held several meetings in July 1987 in an effort to clarify and resolve the PBGC's objections to the proposed agreement. Pet. App. 49a-50a. The PBGC was unwilling or unable to specify its objections to the collective bargaining agreement. AR 523-524, 658. The validity of the post-termination programs was the only matter at issue; LTV Steel's financial status was not discussed. Pet. App. 125a-126a.

Bankruptcy Court Approval Of The 1987 Interim Agreement

LTV Steel, with the support of its major creditor constituencies and the USWA, promptly sought approval of the interim labor contract. The PBGC opposed approval. At the hearing before Chief Bankruptcy Judge Lifland on LTV Steel's application, LTV's witnesses testified without contradiction that the interim agreement was necessary to avoid a crippling strike and to permit LTV and LTV Steel to

reorganize. Pet. App. 45a.[5] On July 16, 1987, the Bankruptcy Court approved the interim agreement, exercising its equitable powers under Section 105 of the Bankruptcy Code to ensure the success of reorganization.

> "Based upon the complete record before me today, including all filed papers, it has become abundantly clear that this Court may and should utilize its equitable power to authorize the terms and payments contemplated by the agreements as they are clearly necessary and appropriate to the goal of rehabilitation for this Chapter 11 Debtor." Pet. App. 46a.

The Bankruptcy Court expressly held that its ruling was an interim order addressing the needs of the ongoing reorganization. AR 624.[6]

Restoration

Eight times the PBGC attempted without success in the Bankruptcy Court, in the District Court and in the Court of Appeals to stay approval and implementation of the collective bargaining agreement. The PBGC appealed the order

5. The financial advisor to the Creditors' Committee, called by the PBGC, testified that he did not believe that a better agreement could have been reached, AR 554; that LTV Steel would nevertheless have difficulty surviving, AR 546-548; but that the "bet the company" risk of a strike was unacceptable. AR 549.

6. Consistent with earlier rulings by the Bankruptcy and District Courts with respect to payment of other retiree benefits, the Bankruptcy Court found that consideration of the PBGC's claims of ERISA "abuse" or "illegality" was premature, id., and held in any event that it was empowered under Section 105 to authorize interim payments so that LTV Steel's reorganization process might continue. AR 623-624.

approving the interim agreement to the District Court, raising its abuse argument. After LTV moved to dismiss the appeal, the agency withdrew the appeal and abandoned further efforts to obtain judicial vindication of its asserted policy against follow-on plans. At the same time, the PBGC was attempting, unsuccessfully, to obtain Congressional sanction for its policy. See Point I *infra*. Following these actions, the PBGC held a fifteen minute telephone meeting of the PBGC's Board of Directors, the first meeting in eight years, AR 598, in which the Board gave blanket approval of any restoration action the PBGC Executive Director chose to take with respect to any company. Pet. App. 47a. The Executive Director then sent LTV the first Notice of Restoration ever issued by the PBGC. AR 1578-1579. The notice purported to restore three of the four terminated plans, and failed to explain why the fourth, to which the same theories could be applied, had not been restored. Pet. App. 125a.

The PBGC's Analysis

The PBGC asserted three bases for restoration: (1) LTV Steel's "abuse" of ERISA in establishing the post-termination programs negotiated with the USWA and approved by the Bankruptcy Court; (2) "LTV Steel's improved financial circumstances;" and (3) "LTV Steel's demonstrated willingness to fund employee retirement arrangements." AR 1578. No further explanation or analysis was set forth in the Notice.

As the District Court and the Court of Appeals found, the administrative record reveals a haphazard process of inadequate factual development and faulty analysis. The voluminous appearance of the "administrative record" is deceiving. The PBGC relied upon fewer than ten pages to explain its administrative action. Fewer than forty pages reflect

regulatory consideration as opposed to pre-existing documents relating to creditor/adversary action. AR 1-14a, 637-645, 1154-155, 1577-1584. The basis for the PBGC's finding of "abuse" is set forth in three conclusory paragraphs of one PBGC affidavit. AR 224-225. Three pages of another document record a rudimentary financial "analysis," comparing a projection of LTV Steel's cash flow and minimum cash needed to fund the pension plans. AR 12-13.

The PBGC's administrative record shows that both the terminations and restoration were based on the same two-year business plan, Pet. App. 112a-113a, even though the PBGC knew that a revised business plan would be made available within days of the restoration decision. Pet. App. 128a n.46. With reference to that two year business plan, the PBGC staff stated at the first meeting to discuss restoration, that at the time of termination a "financial analysis presented to the group based on LTV's most optimistic projections indicated that LTV could not make the required contributions to meet the minimum funding requirements." Pet. App. 113a n.37. The only additional information considered at the time of restoration was LTV Steel's performance and its accumulation of cash in the first five months of 1987. Pet. App. 113a.

The Decision Below

The PBGC filed a complaint in the Southern District of New York seeking enforcement of its administrative restoration, and moved for summary judgment. On June 22, 1988, District Judge Sweet issued an opinion denying summary judgment and vacating the Notice of Restoration. *In re Chateaugay Corp.*, 87 B.R. 779 (S.D.N.Y. 1988), Pet. App. 28a. Judgment remanding the matter to the agency was entered on September 13, 1988. Pet. App. 132a. The PBGC appealed the decision to the Court of Appeals for the Second

Circuit, which issued a decision affirming the District Court. The Court of Appeals found the PBGC's restoration of the LTV plans arbitrary and capricious on numerous grounds:

> (1) the agency did not "adequately consider[] the policies and goals of the bodies of law involved in this case" - ERISA, bankruptcy law and labor law - "and their interaction with each other," Pet. App. 17a.
>
> (2) "Even when we examine the factors upon which PBGC did base its decision, we find no support in the administrative record for the conclusion reached," Pet. App. 17a, specifically finding that:
>
> (a) the PBGC had no support in the administrative record for its conclusion that the CBA Plans were abusive "follow-on" plans. Pet. App. 19a.
>
> (b) the PBGC "financial improvement" rationale was based on "fundamental, yet unexplained and unexamined assumptions." Pet. App. 22a.
>
> (c) the PBGC "did not effectively assess the impact that LTV's status on a debtor in Chapter 11 reorganization had on its financial condition." Pet. App. 23a.
>
> (d) "[N]owhere in the administrative record is there any evidence that PBGC assessed the possibility that the Plans would have to be re-terminated." Pet. App. 25a.
>
> (e) "PBGC neither apprised LTV of the material on which it was to base its decision, gave LTV an adequate opportunity to offer contrary evidence, proceeded in accordance with ascertainable standards . . . nor provided a statement showing its reasoning in applying those standards." Pet. App. 26a.

THE PETITION SHOULD BE DENIED

POINT I

Substantial and Directly Relevant Amendments to ERISA Have Been Enacted Since Termination of the LTV Plans

As the PBGC concedes, since the PBGC involuntarily terminated the LTV Plans, ERISA has been substantially amended specifically to address the policy concerns that the PBGC claims are implicated by the decision below. The Pension Protection Act of 1987 ("PPA") "substantially tightened ERISA's statutory minimum funding requirements," PBGC Pet. Cert. 16 n.14, "increased the liability owed to the PBGC by employers who terminate underfunded plans to 100 percent of benefit liabilities," *id.*, and made it substantially more difficult for employers voluntarily to terminate underfunded plans, requiring that an employer be in reorganization proceedings, that the bankruptcy court approve the termination, and that the termination be necessary to permit the employer to continue in business. *See* Pension Protection Act of 1987, subtitle D of Title IX of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330; 29 U.S.C. §§ 1341 (c)(2)(B), 1362(b)(2)(A) (West Supp. 1988). By making it more difficult to terminate underfunded plans, these amendments protected the agency from abusive terminations. In the process leading to the passage of the PPA, Congress considered and rejected a provision proposed by the PBGC which would have established a five-year prohibition on the establishment of follow-on plans following a voluntary distress termination.[7]

7. *See* H.R. Rep. No. 391(II), 100th Cong., 1st Sess., 1010, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-378, 2313-627; H. Conf. Rep. No. 495, 100th Cong., 1st Sess., 881-885, *reprinted in* U.S. Code Cong. & Admin. News 2313-1627-1631.

These substantial amendments undermine the PBGC's claim that its policy concerns justify the Court's intervention into this case. More fundamentally, even if one were to accept the PBGC's policy concerns, these subsequent amendments make this case an especially poor vehicle for an analysis of ERISA. This Court has recognized that in interpreting a statute such as ERISA the court must consider the objects and policies of the whole law, and the interrelationships among its sections. *See, e.g., Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987). It is entirely inappropriate for this Court to undertake an analysis of a statute as complex as ERISA, *see, e.g., Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 740 (1985), in a case in which directly relevant subsequent amendments do not apply.[8]

Remarkably, the PBGC asserts that this Court should review this case because "PBGC has no experience under the new law to indicate how it will be interpreted by the courts." PBGC Cert. Pet. 16 n.14. This is precisely the reason certiorari should be denied. This Court is not a court of first resort.

8. There is no conflict among federal courts of appeals on the questions presented by this case. As the PBGC noted, the only other case raising similar issues has so far resulted in bankruptcy court recommendations in agreement with the holdings of the District Court and the Court of Appeals in the present case. *USWA* v. *PBGC (In re Wheeling-Pittsburgh Steel Corp.)*, Bankr. No. 85-793, Civil No. 87-355 (W.D. Pa. June 30, 1989). As in the present case, the recent amendments to ERISA are not applicable to the plans terminated in *Wheeling-Pittsburgh*.

POINT II

Consistent With Fundamental Principles of Administrative Law, The Decision Below Remanded the Restoration Notice to the Agency Because the Agency's Action was Arbitrary and Capricious

The Court of Appeals, affirming the District Court, vacated the Notice of Restoration and remanded the matter to the agency because the agency had failed entirely to explain how the CBA Plans constituted an "abuse" of the pension insurance program, and had failed to consider a host of fundamental factors specific to the present case. In remanding the matter to the agency to explain its actions and to consider those factors it had failed to consider in the first instance, the court was performing its well-established obligations under basic principles of administrative law.[9]

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9. Judicial review of agency action under the "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA"), "mandates a searching inquiry into the facts and their relationship to the articulated basis for an agency's action." 87 B.R. at 807. The court must engage in a "thorough, probing, in depth" plenary review to determine whether the agency's decision-making process was reasoned, took into account all relevant policies and information, and reached a result consistent with Congressional intent. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416-417 (1971); *Sierra Club* v. *United States Army Corps of Eng'rs*, 772 F.2d 1043, 1051 (2d Cir. 1985). A reviewing court must determine whether the agency's stated explanation for its action is "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), quoting *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Belland* v. *Pension Benefit Guaranty Corp.*, 726 F.2d 839, 845 (D.C. Cir.), *cert. denied*, 469 U.S. 880 (1984). Exacting judicial review is necessary to safeguard against action in which "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem,

In order to characterize the decision below, whose numerous independent bases are carefully tied to the facts of this case, as suitable for review by this Court, the PBGC repeatedly claims that the Court of Appeals "substitute[d] its judgment" for that of the agency, PBGC Pet. Cert. 20, imposed "an unreliable financial standard" on the agency, PBGC Pet. Cert. 13, and imposed its own balancing of ERISA against bankruptcy and labor law. The Court of Appeals did not substitute its analysis for that of the PBGC, or inappropriately impose particular standards on the PBGC. Rather, as to numerous factors clearly relevant to the restoration decision the Court of Appeals found that the agency had performed *no* analysis and established *no* ascertainable standards. No deviation from fundamental principles of administrative law was required to find the PBGC's action arbitrary and capricious. The holdings of the District Court and the Court of Appeals, while based on a thorough consideration of the complex facts of this case, were not difficult to reach as a matter of law. The administrative process reflected in the PBGC's action was the very antithesis of appropriate agency procedures.

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offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it would not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. These were the standards applied by the District Court and the Court of Appeals in this case, and the application of these standards mandated that the Notice of Restoration be vacated and the matter remanded to the agency.

A. The PBGC Abuse Rationale For the Restoration of the LTV Plans Has No Statutory Basis and No Support in the Administrative Record

The Court of Appeals found the agency's conclusion that the CBA Plans were an "abuse" of the pension insurance system arbitrary and capricious because:

> (1) nothing in ERISA prohibits the provision of benefits in excess of those guaranteed by the PBGC;
>
> (2) the CBA Plans directly resulted from fundamental bankruptcy and labor law policies requiring collective bargaining concerning pension benefits;
>
> (3) the agency had provided no detailed showing that the CBA plans were in fact abusive "follow-on plans"; and
>
> (4) the agency's three unpublished opinion letters did not state an ascertainable standard that could be stretched to cover the CBA plans.

Thus, the Court of Appeals found that the PBGC's "abuse" rationale for its LTV restoration decision had no statutory basis in ERISA, bankruptcy law or labor law, and was not supported by any ascertainable standard or adequate analysis. This holding is correct, is tied to the specific circumstances of this case and raises no issue appropriate for review by this Court.

Section 4047 requires that restoration be based on a determination by the agency that such action is "appropriate and consistent with its duties" under Title IV of ERISA. In determining the appropriateness of such action, it is well-established that an agency must give consideration to competing policies if its actions implicate national policy beyond its

area of expertise. Any possible conflict must be recognized, and any agency action must be narrowly drawn to accommodate such national policies. *See, e.g., Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 172-74 (1962); *LaRose* v. *FCC,* 494 F.2d 1145, 1146 n.2, 1147-50 (D.C. Cir. 1974). Therefore, in reviewing the PBGC's decision to restore three of the four LTV Plans it involuntarily terminated — which decision was based on LTV's establishment, after reaching a collective bargaining agreement, of interim plans existing for the duration of LTV's bankruptcy — a court must consider ERISA, bankruptcy law and labor law.[10] In so doing, the District Court and the Court of Appeals found no evidence in the language or legislative history of Title IV that the provision of benefits beyond what is guaranteed by the PBGC is impermissible, a finding that the PBGC does not now dispute.[11]

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10. No deference is to be given an agency's interpretation of a statute where, as here, "it interprets another agency's statute or resolves a conflict between its own statute and the statute of another agency." *Department of the Navy* v. *Federal Labor Relations Authority,* 836 F.2d 1409, 1410 (3d Cir. 1988); *see also New Jersey Air National Guard* v. *Federal Labor Relations Authority,* 677 F.2d 276, 281-82 n.6 (3d Cir. 1982) ("While we place considerable weight on the interpretation of the Labor-Management Act rendered by the FLRA, we are not obligated to defer to the FLRA's reading of the Technician Act, or to its resolution of the conflict between the two statutes"); *Parola* v. *Weinberger,* 848 F.2d 956, 959-960 (9th Cir. 1988); *cf., Lieberman* v. *Federal Trade Commission,* 771 F.2d 32, 37 (2d Cir. 1985). Even as to an agency's own enabling legislation, "[t]he judiciary is the final authority on issues of statutory construction." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 n.9 (1984); *In re Chateaugay,* 87 B.R. at 812; *see also Immigration and Naturalization Service* v. *Cardoza Fonseca,* 107 S. Ct. 1207, 1220-21 (1987).

11. Indeed, as the District Court observed, the PBGC has taken precisely this position in other litigation. In *Murphy* v. *Heppenstall Co.,* 635 F.2d 233 (3d Cir. 1980), cert. denied, 454 U.S. 1142 (1982), a group of retired USWA employees sued their employer following the involuntary termination by the PBGC of a pension plan, seeking payment of the difference

The District Court and the Court of Appeals also recognized, and the PBGC also does not dispute, that the CBA Plans, in the specific context of the LTV bankruptcy and LTV's collective bargaining obligations, were consistent with federal bankruptcy and labor law policies. Under these circumstances the Court of Appeals correctly found that the PBGC's "abuse" rationale for the restoration of the LTV plans had no statutory basis.

The District Court and the Court of Appeals did not "substitute" their judgment for that of the PBGC in reaching this holding, because, as the District Court decision affirmed in full by the Court of Appeals makes clear, the agency *did not even consider* the significance of LTV's bankruptcy or of its collective bargaining obligations; neither did the administrative record provide any explanation of why the provision of non-guaranteed benefits constituted an "abuse" of the pension insurance system.[12]

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between guaranteed and non-guaranteed benefits. The PBGC as amicus supported the employees' right to recover directly from the employer, arguing that ERISA did not void existing pension contracts and did not impose a cap on the payment of non-guaranteed benefits. "[A]n employer's agreement to provide greater benefits is not inconsistent with Title IV of ERISA." PBGC Amicus Br. in *Heppenstall*, p.3. "The Record does not indicate that the PBGC considered the holding of *Heppenstall* and the position it took in that case in reaching its conclusion that the 1987 CBA Plans constituted an abuse of Title IV." Pet. App. 106a.

12. *See, e.g.*, Pet. App. 102a ("the Record reveals that the PBGC's decision on the abusiveness of the 1987 CBA Plans did not take into consideration the fact that the 1987 CBA resulted in large part from LTV Steel's legal obligations under section 1113 of the [Bankruptcy] Code and the USWA's pursuit of its rights under federal labor law"); Pet. App. 109a-110a (District Court, referring to argument in PBGC brief that "it could become routine for employers to file for bankruptcy primarily to escape their pension benefit obligations," observed that the argument "is unsupported by any facts or even expert opinion in the Record, and the

The PBGC's failure even to consider the substantial federal policies affected by its Restoration Notice renders its action arbitrary and capricious. This Court's ruling in *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513 (1984), and its legislative aftermath illustrate both the weight ascribed by this Court to the fundamental principles of bankruptcy reorganization and the special recognition given labor law. In *Bildisco*, this Court recognized the "special nature of a collective-bargaining contract," but ruled that collective bargaining agreements were not to be treated in a reorganization case differently from other contracts. 465 U.S. at 527. In response, Congress enacted Section 1113, which imports fundamental principles of labor law into the Bankruptcy Code and is intended to encourage the collective bargaining process. *In re Century Brass Products, Inc.*, 795 F.2d 265 (2d Cir.), *cert. denied* 479 U.S. 949 (1986). A debtor must negotiate in good faith over any proposed modification of a labor contract, *Truck Drivers Local 807* v. *Carey Transportation, Inc.*, 816 F.2d 82, 89 (2d Cir. 1987), including retiree benefits. *Century Brass*, 795 F.2d at 274; *Allied Chemical & Alkali Workers of America, Local Union 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971); *Connecticut Light & Power Co.* v. *NLRB*, 476 F.2d 1079, 1081 (2d Cir. 1973).

However, Congress maintained the structural goals of reorganization in Section 1113. "[A]ll creditors, the debtor and all of the affected parties are treated fairly and equitably." 11 U.S.C. § 1113(b)(1)(A). "The purpose of this provision

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Record does not contain any analysis of the extent of any such threat, if realized").

. . . 'is to spread the burden of saving the company to every constituency while ensuring that all sacrifice to a similar degree.''' *Carey Transportation*, 816 F.2d at 90, quoting *Century Brass*, 795 F.2d at 273.

The PBGC now contends that it properly ignored this entire process, mandated by two weighty bodies of federal law, in making its restoration decision. Indeed, before the Court of Appeals the PBGC asserted that it was "not the PBGC's responsibility to consider Section 1113." PBGC Br. at 31. The PBGC's position blatantly violates this Court's expression of the importance of balancing "multiple, competing considerations" within Chapter 11, *Bildisco*, 465 U.S. at 525, and Congress' expressed mandate that the goals of labor law be given a special place in the Chapter 11 process.[13]

13. The District Court and the Court of Appeals also held that even if it were within the agency's discretion to find that the establishment of "follow-on" plans as part of a collective bargaining agreement entered into during bankruptcy proceedings constituted an "abuse" of the pension insurance program, the administrative record provided no support for the conclusion that the CBA Plans were "follow-on" plans. Both the District Court and the Court of Appeals found that the three unpublished PBGC opinion letters which the agency put forward to explain why the CBA plans were abusive "follow-on" plans "concerned cases that were 'too factually dissimilar from the instant case to be of substantial assistance here.'" Pet. App. 20a. In a footnote, the PBGC apparently asks this Court to determine itself whether the inclusion of "the plans themselves," *see* AR 230-303, and three paragraphs in an affidavit by the manager of the PBGC's Actuarial Policy Division, *see* AR 219, in the administrative record were sufficient to support the agency's conclusion that the CBA Plans were "follow-on" plans. PBGC Cert. Pet. 20 n.17. Why this issue is an appropriate one for review by this Court is not explained.

B. The Agency's Determination of "Financial Improvement" Has No Support in the Administrative Record

The District Court held, and the Second Circuit affirmed, that financial improvement is a basis for restoration. *See* Pet. App. 21a. Thus, on remand, the agency need only actually consider whether LTV Steel, consistent with its obligations under bankruptcy law, can fund the plans, or whether its inability to do so will result in re-termination.[14]

In reviewing the record thus far created, in accordance with its obligations as a reviewing court, the Court of Appeals looked to see if the agency had given *any* consideration to the most obvious question arising from restoration: will it lead to immediate re-termination? The agency had not, and the District Court and Court of Appeals appropriately found that the agency's failure even to consider this question was arbitrary and capricious:

> *"We note that nowhere in the administrative record is there any evidence that the PBGC assessed the*

14. This holding actually renders superfluous consideration of the agency's "abuse" basis for restoration. If financial improvement is a *necessary* condition for restoration — as it must be, since to "restore" plans to an entity that cannot afford them would be a meaningless exercise leading to immediate re-termination — and a *sufficient* condition for restoration — in that the agency need find nothing other than financial improvement to justify restoration — then the agency's discretion is as broad as it logically can be. As long as the agency can show relevant financial improvement, it can restore for any reason whatsoever, without further justification. If relevant financial improvement cannot be shown, restoration is inappropriate even if it is otherwise consistent with PBGC policy.

possibility that the Plans would have to be re-terminated. ERISA contains no special provisions governing re-termination; however, the standards would be the same as for initial termination. If in the near future LTV were once again found unable to adequately fund the Plans, the resulting vacillation in agency policy would lead to uncertainties on the part of the retirees, plan sponsors, creditors and the government. Such uncertainty is to be avoided where possible. *See New York Council, Ass'n of Civilian Technicians,* 757 F.2d at 508." Pet. App. 25a (emphasis supplied).

In making its restoration decision the agency was required to consider whether it would lead to re-termination (or justify its *post hoc* assertions on appeal that such consideration is impossible). ERISA does not intend that pension plans be ping pong balls ceaselessly batted between termination and restoration depending on short term factors. Section 4047 authorizes restoration only when restoration is consistent with the PBGC's duties under Title IV. Under Section 4042(a)(4) the PBGC must involuntarily terminate "as soon as practicable" a plan which has insufficient assets to meet current obligations. 29 U.S.C. § 1342(a) (Supp. IV 1986). It would be senseless to interpret Section 4047 to allow restoration where it is plain that a plan will have insufficient assets to meet current obligations and therefore must be re-terminated by the PBGC under ERISA § 4042.

To attempt to justify the intervention of this Court, the PBGC now distorts the Court of Appeals' holding on "financial improvement" into one which will make "restoration of any pension plan a virtual impossibility." Rather, the Court of Appeals properly held that five months' accumulation of cash by a company in bankruptcy is simply no indication of

"financial improvement"; it is merely an effect of the protections afforded by the reorganization process. Pet. App. 23a. Assuming arguendo that the agency may ignore bankruptcy *policy,* it cannot both ignore the *fact* of bankruptcy *and* rationally assess whether LTV's finances have improved. Indeed, both the inevitable accumulation of cash and a debtors' obligation to distribute it equitably among all of its creditors must be considered in any assessment of the debtor's ability to fund pension obligations. As the Court of Appeals observed, the purpose of the accumulation of cash in bankruptcy is to lead to a "fair distribution of the debtor's assets," with "each creditor receiving a proportionate share of the amount of its claim." The court held that the PBGC's claims were pre-petition claims of the same status as those of other general unsecured creditors, *citing Trustees of the Amalgamated Ins. Fund* v. *McFarlin's Inc.,* 789 F.2d 98, 103-04 (2d Cir. 1986). "Hence," the Court of Appeals explained, "any additional money that LTV has must be distributed fairly among the creditors, with the pension plans receiving no special priority." Pet. App. 23a-24a. Undoubtedly the failure of the agency to consider the fact of bankruptcy and the existence of thousands of other creditors with billions of dollars of claims to LTV's assets was arbitrary and capricious.[15]

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15. Although these glaring gaps in the administrative record would themselves justify a remand to the agency, the holdings of the District Court and Court of Appeals that the agency's "financial improvement" conclusion was arbitrary and capricious were also based on additional instances in which the agency completely failed to even *consider* some of the most fundamental factors relating to LTV's supposed financial improvement:

> (1) The agency assumed, without any explanation, that LTV would be able to obtain $600 million of funding waivers from the IRS when the IRS had previously denied LTV's waiver request for 1985 and had revoked its waiver for 1984, Pet. App. 115a; "The record dis-

C. The Court of Appeals' Procedural Holding Does Not Raise The Issue of Whether *Vermont Yankee* Is Applicable To Informal Adjudication

After holding that the agency had no statutory basis for its assertion that the CBA Plans constituted an "abuse" of the pension insurance program; that the agency had failed to even consider the fundamental federal policies affected by restoration; that the administrative record contained no reasoned analysis showing that the CBA Plans were "follow-on" plans; that the agency had concluded that LTV's finances had improved such that plans could be restored without ever considering whether the plans would be re-terminated shortly afterwards; and that the agency's financial analysis was riddled with basic lapses in reasoning, the Court of Appeals made the following observations concerning the method by which the agency had reached this arbitrary and capricious result:

> "In the instant case, PBGC neither apprised LTV of the material on which it was to base its decision, gave

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closes no reason to believe that the IRS, after having denied previous waiver requests, would grant such requests in 1987." Pet. App. 22a.

(2) The agency assumed, without any explanation, that $50 million savings resulting from job reductions made pursuant to the 1987 Collective Bargaining Agreement would be retained in subsequent bargaining agreements even though the entire reason for the Union's concessions would be eliminated if the Plans were restored. Pet. App. 22a-23a.

The PBGC does not even attempt to argue that these findings of the District Court and Court of Appeals are erroneous, let alone that they raise any issues outside of the specific context of this case.

> LTV an adequate opportunity to offer contrary evidence, proceeded in accordance with ascertainable standards by which to evaluate when a plan sponsor's financial condition has so improved as to warrant restoration, nor provided a statement showing its reasoning in applying those standards. Failure to do any of these things renders the decision arbitrary and capricious. . . .
>
> On remand, PBGC may be able to justify its decision. However, based on the administrative record presented to the district court and to us, its decision cannot be upheld. Because PBGC's decision was not sustainable on the administrative record, the district court provided the appropriate remedy by vacating PBGC's Restoration Notice and remanding the matter to PBGC. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978); *Camp* v. *Pitts*, 411 U.S. at 143." Pet. App. 26a - 27a.

The present case does not raise the question "whether the principles of *Vermont Yankee* apply to informal adjudications like the PBGC's action in this case." PBGC Cert. Pet. 28. The Court of Appeals observed that the methods employed by the agency did not have the most minimal attributes of reasoned decisionmaking. Thus, citing *Vermont Yankee*, the Court of Appeals found that the appropriate remedy for the PBGC's arbitrary and capricious action was to remand the matter to the agency. Pet. App. 27a.

The Court of Appeals' observation that the method employed by the agency was arbitrary and capricious raises no issue appropriate for review by this Court. Two of the four failings listing by the Court of Appeals — the failure to

employ "ascertainable standards" or to provide "a statement showing its reasoning" — go to the substance of the administrative record rather than the procedures used to compile it. In mentioning the other two failings — the failure to apprise LTV of the material on which it was to base its decision, or to give LTV an adequate opportunity to offer contrary evidence — the Court of Appeals, far from "imposing . . . procedural requirements approximating those prescribed for formal adjudication," had merely observed that the agency had not taken the most minimal steps necessary to create an adequate agency record in the circumstance of this case. Even so, the Court of Appeals simply noted that the agency's failure to take *any* of the four steps listed was arbitrary and capricious. This holding is correct, is not in tension with any holding of this Court, and presents no question appropriate for review by this Court.

CONCLUSION

For the aforementioned reasons the petition should be denied.

Dated: October 11, 1989

Respectfully submitted,

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APPENDICES

APPENDIX A

OTHER STATUTES INVOLVED

11 U.S.C. § 1113

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section 'trustee' shall include a debtor in possession), shall-

> (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
>
> (B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized

representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that-

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX B

PARENT CORPORATION, SUBSIDIARIES, AND AFFILIATES

Chateaugay Corporation
Reomar, Inc.
The LTV Corporation (parent corporation), f/k/a
  Kentron International Company,
  Jones & Laughlin Industries, Inc.
  and Lykes Corporation
LTV Steel Company, Inc. f/k/a/
  Jones & Laughlin Steel Corporation
  Jones & Laughlin Steel Incorporated
  Republic Steel Corporation
  Youngstown Sheet and Tube Company
  Republic Hibbing Corporation d/b/a
  LTV Steel Flat Roll and Bar Company
LTV Steel Tubular Products Company
  f/k/a LTV Tubular Products Company
  LTV Steel Specialty Products Company
  LTV Specialty Products Company
  Jones & Laughlin Steel Specialty
  Products Company, Inc.
LTV Sales Finance Company
LTV Aerospace and Defense Company
AM General Corporation
Amland Corporation
Bardale Coal Company
Barrel Corporation of West Virginia
BCNR Mining Corporation
Crystalane, Inc.
Crystalee

Dearborn Leasing Company
Erie B Corporation
Erie Development Company
Erie I Corporation
Erie Mining Company, a limited partnership
FC Divestiture Corporation
Georgia Tubing Corporation
Gulf States Steel Corporation
Halcorp, inc.
J.K. industries, inc.
J.W. Storage Company of Ohio
Jalcite I, Inc.
Jalcite II, Inc.
Jalore Mining Company, Ltd.
Jones & Laughlin Environmental Properties, Inc.
Jones & Laughlin Mining Company, Ltd.
Jones & Laughlin Ore Mining Company
Juddcorp. Inc.
Kentron Saudi Arabia, Inc.
LSC Leasing Inc.
Lorain Pellet Terminal Co.
LTV Education Systems, Inc.
LTV Electro-Galvanizing, Inc.
LTV Energy Products Company
LTV Holdings, Inc.
LTV International, N.V.
LTV Leasing, Inc.
LTV Properties, Inc.
LTVUS Corp.
Lykes Equipment Corporation
Lykes Leasing Corporation
National Telephone Systems, Inc.
Nemacolin Mines Corporation
Oil States Offshore Marine, Inc.

Oil States Rubber Co.
Repsteel Overseas Finance, N.V.
Republic Buildings Corporation
Republic Drainage Products Company
Republic Technology Corporation
Republic-Reserve, Inc.
Sierra Information Systems Corporation
a/k/a SISCOR
Sierra Research International Corporation
Technical Plastics, Inc.
Tuscaloosa Energy Corporation
Universal Time/Frequency, Inc.
Vought Industries, Inc.
Vought International, Inc.
Vought Overseas Ltd.
Vought Properties, Inc.
Youngstown Erie Corporation
YST Erie Corporation